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April 22, 2010

US Army Corps of Engineers
Attn: CECW-CE, Douglas J. Wade
441 G Street, NW
Washington D.C. 20034-1000

Re: **Federal Register/Vol. 75, No. 26; Process for Requesting a Variance From Vegetation Standards for Levees and Floodwalls; Docket No.: COE-2010-0007**

Dear Mr. Wade:

Our office represents several Diking Districts in the State of Washington. Please accept the following as our supplemental comments submitted on behalf of these Dike Districts in Skagit County Washington, regarding the notice in the Federal Register of February 9, 2010, as identified by Docket No. COE-2010-0007.

These comments are additional and supplemental comments to those which we had filed on March 11, 2010. These supplemental comments are to be incorporated into, and read in connection with the prior filed comments. These comments will address supplemental issues and proposed changes to variance policies considered and discussed with various entities after our initial comments. These changes relate to proposed process and policy, and issues relating to unique considerations in the Pacific Northwest in both policy and implementation of policy, and problems and consequences which dictate the need and nature of changes to current variance policies. These comments are submitted and directed to the goal of reaching a uniform, predictable, and coordinated USACE nationwide policy.

I. BACKGROUND – CHANGES IN FLOOD CONTROL AND ENVIRONMENTAL REGULATIONS

Historically, many of the engineering and policy rules of USACE have existed since the 1930s. ER 500-1-1, EP 500-1-1, ETL 1110-2-301, and related Engineering Regulations have predated ESA, and numerous other environmental regulations. These preceding regulations have been in effect for decades, and have provided consistent and adequate flood protection, balancing issues of public safety, and environmental considerations.

In prior USACE guidelines, it has been noted that: "Public safety is the number one priority of the USACE levee safety program." USACE Corps Points, 5 May 2009. However, in the intervening decades, legislation and regulations have evolved, with the result that various groups, both governmental and special interests, have enforced regulations which, at times, take precedent, or shift the balance from strict engineering and safety considerations, as well as Corps regulations, to those emphasizing environmental requirements and restrictions.

Due to the enactment of legislation, including the Clean Water Act of 1977, the Clean Air Act of 1990, as well as creation of agencies including the Environmental Protection Agency, and federal, state and local regulatory bodies, environmental restrictions and considerations have now become critical elements of most flood control repairs and projects. Substantial environmental regulation, uncertainty as to interpretation of regulations, and competing agency controls, at all levels of regulation have substantially changed the landscape, and have also conflicted with long-standing policies and guidelines of USACE.

Issues regarding flood control, flood and levee safety, PL84-99 and FCAAP funding, and maintenance, repair and projects which necessarily involve navigable and non-navigable waterways, including fresh water levees and salt water dikes, involve areas where habitat and environmental considerations are paramount. These issues have had significant effects on levee maintenance, repairs, projects and flood control, including levee safety, and pre- and post-flood repairs and projects. Endangered species have now been identified in aquatic habitats, and mitigation of habitat losses and jeopardy to endangered species, either actual, or alleged, have added complexities to projects involving flood repairs and control, and by necessity, the way USACE does business, and enforces its regulations.

This has now resulted in programmatic difficulties, which vary from region to region, and district to district, involving repairs and flood control, as well as expenditures of PL84-99 funding, along with habitat and mitigation, including ESA section 7 consultation with agencies, and also involving NOAA, NMFS, Fish and Wildlife agencies, EPA, and other entities. There has been legislation to change the definition of "navigable waters," which would broaden jurisdiction of environmental agencies, and to broaden impact of environmental and endangered species regulations, and involving lengthy and costly consultations, and voluminous biological assessments and biological opinions.

This has been further complicated by lawsuits involving FEMA, and other governmental agencies which have expanded the powers of environmental agencies, which may conflict with USACE Policy, and prior long-standing engineering and flood control regulations. Several lawsuits, initiated by pro-environmental groups, or governmental agencies, generally concentrate on pro-environmental issues, and sometimes to the expense of established public safety and flood control issues. In some cases it would appear that the balance between public safety and environmental considerations has been disproportionately shifted in favor of environmental issues, and at the expense of reduced public safety. A realistic, scientific, and streamlined balance must be reached between these competing legitimate and necessary considerations, which would benefit both environmental considerations, and public safety. A revision of the Vegetation Variance Policy is a valuable step in this direction.

The USACE strict enforcement of its regulations and emergency management services can conflict with growing control and influence of regional and community flood control entities. This can be seen in California, as well as in Washington state, in other states, where large community, and state entities have created flood control zone districts, flood control associations, flood and irrigation districts, and other large regional agencies which have assumed

the duties of flood control. These flood control zone districts and various flood agencies tend to be large in terms of budgets, complexities, and administration. Many diverse public and special interests are part of, and influence these agencies, including local community preservation groups, environmental groups, tribes, natural resource entities, and community and pro-environmental preservation organizations.

In some areas, these large flood control districts, through political influence and funding, may overwhelm local smaller Diking, Drainage, or flood control agencies, which are often operated under state law by a small number of elected commissioners, with limited budgets, which can become dependent upon the larger flood control agencies for funding, and approval of projects. In some areas, local Public Works agencies have been taken over flood control funding and permitting, leaving the smaller diking and flood districts with little authority or power to engage in maintenance, repairs, and projects. The net result of this trend is that smaller flood control agencies or entities can be absorbed into, controlled by, or lose statutory authorities, and must partner with larger entities, and the strict rules of levee repairs and maintenance, public safety, and engineering standards are minimized or disregarded, by majority policy makers, many of whom hold environmental considerations paramount in their agendas.

An example which has occurred involved USACE engineers who marked large trees on the levees for removal, which posed a hazard to a levee, but then were overruled and disregarded by environmental resource officials who prevented the tree removal. These trees, which clearly violated vegetation policies of USACE were allowed to remain in continued violation of that policy by a division of the very agency required to enforce those policies. The result is that even in USACE, the pendulum can swing in the direction of maximizing the importance of habitat and environmental considerations, and sometimes driven by political considerations, to the expense of life and safety issues and matters dealing with public safety and existing regulations.

In many jurisdictions, flood control repairs and projects, which once were accomplished in a short period of time, maximizing public safety at an acceptable cost, are now being delayed sometimes for years, and other times abandoned, while the participants wend their way through the circuitous process of agency consultations, biological studies, addressing issues of special interest groups, and permitting requirements to complete repairs or work. In some cases, the study of habitat and preservation of endangered species, including fish, are studied to the point of excessive delay and consumption of funding and resources available for the project, which is for flood control and the protection of public safety and people. In one division, such onerous and time consuming and costly demands for protection of salmon species were made, with little scientific proof of actual harm, that emergency repairs under PL84-99, for flood damage in 2006, have still not been completed or approved, now four years latergh.

II. COMMENTS TO THE PROPOSED VEGETATION VARIANCE PROCESS

The vegetation variance issues have now become an integral component of this problem. In several states, there are irreconcilable conflicts between environmental and levee safety considerations where it involves vegetation on flood control works. The conflict has become one of saving the environment and fish, wildlife, and endangered species, versus protection for public

safety, repair of infrastructure, such as dikes, levees, and flood projects for the protection of many cities and towns.

These regulatory conflicts are taking place in many states, with differing geography and hydrology of river and water systems. Issues such as structural integrity of the levees and public safety must be addressed, while accounting for habitat and environmental considerations. For this reason there must be a rigorous and intensive examination of the effectiveness and advisability of allowing or retaining vegetation, and any variance should be strictly construed to allow vegetation only when it does not impact structural integrity, functionality, or accessibility in any respect.

A. Need For Thorough Review – Only Feasible Means and Submittal Checklist

From this standpoint, the threshold of approval in the proposed policy, where vegetation is the "only feasible means" to preserve, protect, and enhance natural resources, and/or protect the rights of Native Americans is the proper and appropriate standard, and should be maintained. Given the frequent imbalance in consideration of environmental concerns and species impact, which often conflicts with considerations of public safety, in many examples, the introduction of vegetation and plantings on the levee has now almost become the rule and not the exception. In light of the risks involved, a thorough review process is certainly justified, and should be an extensive process which fully analyzes all issues regarding vegetation and issuance of a variance.

Historically, general Army Corps policies since 1935 have dictated vegetation-free levees, and this has been reinforced under ER 500-1-1 and its progeny, and EM 1110-2-301, and ETL 1110-2-571. Despite this rule of vegetation-free levees in certain jurisdictions, where the priority of a flood control districts is that of habitat, vegetation can become a requirement as a result of political and public interest groups creating justification and demands for vegetation. The general rule is clear that flood structures shall remain vegetation-free, unless a variance exception is obtained.

For this reason, the requirement under paragraph 6.a.(1) *Process* that "the variance must be shown to be necessary and the only feasible means to preserve, protect and enhance natural resources, and/or protect the rights of Native Americans…", is a good proposal and should remain intact. This accompanied with the paragraph relating to "Enclosure 1 – Vegetation Variance Request: Submittal Checklist" is a very good requirement, given the risks involved, because it gives a thorough and detailed road map of what is necessary to justify a variance. Again, a variance should be the exception and not the rule, and this checklist sets forth a detailed and specific inventory of items to be addressed.

The proposed vegetation submittal checklist should be maintained in the final guidance. It is an excellent summary of nearly any issue which may arise in a variance process. The checklist would address many comments which have been made, regarding time limitations for acceptance, acceptance at various levels of the approval process, structural integrity, time extensions for studies, and environmental regulations such as ESA and NEPA. Presumably, if a detailed submittal is made by a local sponsor, with complete and thorough information, it can be

analyzed more quickly by USACE, and a decision made in a more efficient manner. The checklist would serve as a clearing house for all of the issues which potentially would be raised, in any event, causing delay, problems and inaccurate decisions, if the checklist process was not made available. The checklist is a detailed format which is a significant step in making variance policy organized, coordinated between other environmental compliance regulations and engineering standards, and is a substantial step forward in obtaining a uniform, predictable, and coordinated national policy. It is clear that such a process, with HQ approval would streamline and would eliminate many of the conflicts which our Districts are currently encountering, and which are substantially slowing completion of repairs, maintenance, and projects.

B. USACE Application Only With Concurrence of Local Sponsor Owned Levees

The vegetation variance issues are important, and it appears will become more important in the future. This is because many projects involving flood control repairs and improvements may or will involve ESA section 7 consultation with environmental agencies, including NOAA, and NMFS. During the course of these consultations, inquiry will be made as to whether or not the project will pose impact to endangered species. There will be a great likelihood, and this has already occurred in several districts, that in this consultation, vegetation on or near levees or flood control works will be required, to provide habitat and enhancements for endangered species.

There will be cases where the local sponsor, whether a Dike District or levee improvement or flood control district may object to vegetation placement or retention on the levee, as being in conflict with USACE Engineering Regulations and posing a threat to safety. In the case of irreconcilable conflict, repairs and projects may simply be abandoned, or run out of money due to excessive delays, thus endangering protection of human populations, degradation of the levees, and impacts on levee structures and public safety. In a case where years may be spent studying and protecting fish species, while prior damage to levees cannot be repaired, another flood can occur unexpectedly, which could further damage or destroy the weakened levee, and harm not only human life and property, but the habitat and species which were intended to be protected. A balance must be reached in this, sometimes illogical, expensive and wasteful use of resources. Thus, the variance process will become more important, to resolve conflicts involving demands for vegetation which may be over the objection of the local sponsor.

If, on the other hand the local sponsor and either environmental groups or other partners with the local sponsor are in agreement, then the variance process can work well, in particular under the new rules which are quite detailed in granting the variance. The problem occurs where there is a disagreement with the local sponsor, and special interest groups or other entities attempt to impose or influence vegetation placement or retention on levees over the objection of the local sponsor, or use the demands for vegetation and the ensuing dispute as a delaying tactic to prevent maintenance or construction, or to gain political advantage.

In the final analysis, a variance should remain the process for granting an exception, and not establishing a rule which would essentially require vegetation on flood control structures, unless there is proof under the rules that the vegetation planting or retention would harm the flood

control structures. The focus of the inquiry has been changed, to maximize environmental considerations and minimize public safety considerations, and the balance should be shifted back to emphasis on public safety, structural integrity, and accessibility to the flood control structures.

In our prior discussions with USACE, we had appreciated comments and suggestions regarding the addition of the local USACE District as an applicant in the variance process. This is a dramatic departure from the 1930s, and prior Engineering Regulations for flood control works. In fact, this is the first time that the local USACE District could apply individually for the variance.

This issue of the local USACE District being the applicant was addressed, and changes were suggested that would appear to be productive and would assist in preventing problems such as the above example, while also allowing for variances where the local sponsor and local USACE District deems appropriate. It was suggested that paragraph 6.*process* be revised as follows:

> 6.*process*. The process for the request and approval of a vegetation variance consists of the following steps.
>
> a. The project sponsor, or district, **with concurrence of project sponsor** (when appropriate as outlined in paragraph 9.g. of this document) shall submit a Vegetation Variance Request as described in paragraph 7, to the Commander of the appropriate USACE District. The request shall fully explain the nature of the variance being requested and demonstrate compliance with the following two basic criteria. …

In addition, regarding the reference to paragraph 9.g., the same concurrence change should be made as follows to paragraph 9.g:

> 9.g. …
> For areas in which ESA considerations exist, the district, **with concurrence of the project sponsor,** can apply for a variance in conjunction with planning and design of future rehabilitation under PL84-99 and associated measures needed to comply with ESA.

As noted previously, this is the first time since the 1930's that the district itself is permitted to individually request a variance. This is a significant deviation from prior long-standing engineering policy, and in addition, becomes problematical, standing alone, where the rest of the paragraph provides that the Vegetation Variance Request is made to the Commander of the district. In essence, the district is making a request to itself, which would be a pointless exercise, presuming the variance would be accepted by the same entity as the requesting party.

This is not only internally inconsistent, but to a certain degree would be a conflict of interest with the district requesting, and the district accepting. This language can be harmonized and this inconsistency and conflict removed by using the concurrence language noted above, which will always involve approval of the actual project sponsor, who will either make the request for

variance itself, or with the concurrence of the local sponsor, a mutually agreeable request can be made by the local USACE District.

Further, this provides mutual agreement, and avoids any conflicts or disputes. In the event that a variance is not requested or needed by the project sponsor, or other alternatives exist, then the district cannot force a variance for other reasons, over the objection of the local sponsor. This would create a situation where the project sponsor, which has responsibility for the project or repairs will maintain its primary authority over whether a variance should be granted or not. If a variance is requested by the district, then there can be joint application between the two, and conflict is avoided. In cases involving a federally owned flood control structure, then, USACE could seek a variance, and would essentially take the place of the local sponsor under its federal authority.

In cases where ESA considerations may exist, then the project sponsor, before repairs or projects are commenced, would be required to address the ESA considerations, and any associated mitigation, or the work would not be done. If necessary the project sponsor would apply for a variance, or the District, with the concurrence of the project sponsor could apply for a variance. However, if a variance is not needed for required mitigation, it should not be forced upon the project sponsor by the local USACE District.

We had previously discussed problems with debris accumulation. This is why a strict limitation on vegetation on the levees is so critical, as a single tree, even a small willow, can trap LWD during high water and accelerated river flows, which will cause debris accumulation, scour, and levee failure. Because vegetation on the riverside of the levee always poses a risk to levee integrity and impairs accessibility and inspection, a variance should be granted only in necessary cases, where it is clear after a thorough review process that no threat to structural integrity or accessibility exists.

III. CONCLUSION

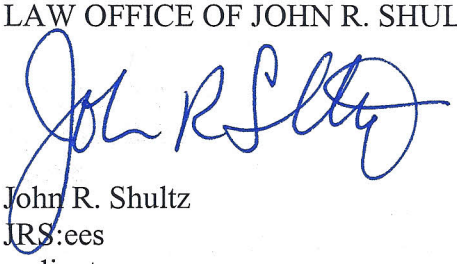
What is needed from USACE is a clear, defined, and scientifically based process, which allows for the continuance of PL84-99 work, with the local sponsors, but where there are some variables in the project, can be addressed, in a formalized specific manner. A variance is therefore appropriate in certain cases, but **must be shown to preserve the structural integrity of the levee and accessibility for maintenance and flood control in all respects.** In summary, where a variance is deemed appropriate and feasible, application **should only be allowed after a thorough review process, which fully considers alternatives, compliance with regulations, and levee safety. The proposed checklist will effectively serve this purpose and ensure that variances are not hastily granted.** Further, with regard to USACE application, a variance **should only be processed or approved only with the project sponsor's concurrence** in doing so. This will ensure that disputes do not arise between USACE and the local sponsor regarding placement or desirability of vegetation. Only in this fashion can it be guaranteed that integrity and access are never undermined.

It is of the utmost importance that our levees function properly and where a risk is to be taken, it should only under the most thoroughly understood and considered circumstances. A shortened or abbreviated or expedited process for variance determinations is not in the best interest of the public, the Army Corps, or local Diking Districts where the risk of devastating flooding exists.

Please call if you have any questions or wish to discuss the above.

Very truly yours,

LAW OFFICE OF JOHN R. SHULTZ



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